BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DE ANNA MERRILL	)	
Claimant	)	
V.	)	
	)	Docket No. 1,064,126
GEORGIA PACIFIC	)	
Respondent	)	
AND	)	
	)	
INDEMNITY INSURANCE CO. OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the December 15, 2014, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on April 7, 2015.

APPEARANCES

John J. Bryan, of Topeka, Kansas, appeared for the claimant. Nathan D. Burghart, of Lawrence Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant entitled to a 10 percent permanent partial functional whole body impairment followed by a 68 percent permanent partial general (work) disability based on a 71 percent wage loss and a 64.25 percent task loss. Respondent was ordered to pay all authorized medical expenses related to treatment of the claimant's injuries subject to the Kansas Workers Compensation Schedule of Medical Fees. All known medical expenses to date, totaling $5,511.35, have been paid, and claimant was awarded future medical benefits with Dr. William Leeds.

Respondent appeals, arguing claimant was terminated for cause, the Award should be reversed, claimant should be limited to her functional impairment and denied a work disability.

Claimant contends the Award should be affirmed.

Issues on appeal:

1. Was claimant fired for cause and, therefore, ineligible for work disability benefits?

2. If claimant was not fired for cause, what is the nature and extent of claimant's disability, including, but not limited to whether claimant is entitled to a work disability.

FINDINGS OF FACT

Claimant first went to work for respondent in Blue Rapids, Kansas, in October 2011, as a sacker. The job involved filling large paper sacks with different components for floor leveler and cement. The sacks weighed 25 to 100 pounds. Claimant described the work environment as very dusty because the product was shot out of a tube at a very high speed, by compressed air into the sacks. She testified this caused the bags to break easily. There is also an unmanned automatic sacker position and if anything is a little off, a stream of the dust could be shot out into the facility. Claimant testified it was always hazy and particles can be seen in the air.

At some point, claimant was moved to the mixer floor where she had to fill large hoppers with different components. During the process dust would be in the air. Claimant testified that it was so dusty, employees had to clean their safety glasses every 10 or 15 minutes. Claimant described the work environment as very dusty, hot, humid and windy. She indicated the employees wear dust masks on a regular basis while working. She never saw any respirators.

In December 2012, claimant was working for respondent as an Ultra operator cooking large amounts of white gypsum in autoclaves. Once cooked, the gypsum is put in baskets and moved to giant driers. The gypsum then moves into a series of tubes, screws and air tubes to be pulverized into a dust the consistency of baby powder. From there the gypsum moves to hoppers and through a SWECO screen. Claimant testified that baskets of gypsum weigh a couple of tons and are moved with an overhead hoist. Claimant indicated it is usual for employees to get white powder on their clothing every day.

On December 18, 2012, claimant, while changing out a SWECO screen, was hit in the face with gypsum dust. Claimant was hit with a 40 pound stream of gypsum and had gypsum in her eyes, ears, nose and mouth. The gypsum was also under her hard hat and down her shirt. She testified the incident caught her off guard and she took a quick breath, inhaling gypsum. She had safety glasses on at the time, but they did not protect her eyes

in this instance. Claimant had a dust mask with her, but it was not covering her mouth at the time.

Claimant testified the force from the powder caused her to stumble back into the wall. Once she got her bearings she stumbled down the platform she was on and started cleaning herself off and radioed for help while making her way to the office. The plant manager, a couple of mechanics, and several others came and she told them what happened. She requested medical treatment, but none was provided. She was told she needed to finish her shift and she would be fine. As part of her cleanup, claimant washed her face and hands and an air hose was used to blow the powder off her clothing and out of her hair.

After the accident, claimant experienced burning in her sinuses, her throat, her mouth and her lungs, especially the left. Within three hours, she had big blisters in her mouth, with constant burning, she was coughing and hacking and suffered nosebleeds and blood blisters around her eyes. She was also having a hard time breathing. A couple days after the accident, claimant went to the emergency room at Community Memorial Health, Inc., because her lips were turning blue and she couldn't breathe. Claimant received treatment to help with her breathing. The ER records describe claimant's skin as moist and pink.

A month later respondent scheduled claimant to see Gerald R. Kerby, M.D., at the KU Medical Center on January 15, 2013. Dr. Kerby told claimant she needed to be away from work for at least a month. However, since she could not afford to be off that long he recommended being away at least four days, followed by a test return to see if she could tolerate working in the environment. Claimant returned to work and wore a dust mask. She testified she was moving slow because she could not breathe. It was difficult because she had to go up several flights of stairs on a regular basis and had to stop multiple times. Claimant testified the warehouse she works in is large and covered inches thick with gypsum dust. When the windows were opened the dust would be stirred up. She testified there is also white dust outside of the warehouse until you get a mile or so away from the premises.

On February 2, 2013, around 2:00 a.m., there was an equipment breakdown and claimant notified Toby Oatney, the on-call manager. Claimant testified that she spoke with Mr. Oatney multiple times and he told her she needed to shut the equipment down and go home. Claimant was not able to properly shut down, but instead she took precautions to insure there would be no damage if the equipment was left running. Mr. Oatney continued to tell claimant to shut down and go home. Finally, after her fourth attempt, claimant shutdown and left. A couple of days later, claimant's employment was terminated. Her last day of work for respondent was February 5, 2013. Claimant responded to the termination via letter explaining what happened on February 2 and also filed a union grievance. Claimant heard nothing about the status of her grievance for over a year. When she inquired in July 2014, she was told it was closed.

Claimant had been fired by respondent once before this accident. In the Summer of 2012, respondent attempted to terminate claimant's employment for allegedly not adequately performing her job duties. Claimant filed a successful grievance, forcing respondent to return her to work. She was put in the office updating files. She was then moved to the Densite department and then bid to the Ultra department where she later had her accident. Claimant testified respondent was not happy about having to take her back. She testified she had no complaints about her work in these departments. She was never told her work was not up to company standards or that she needed to do better. Before she was fired the first time she was given a warning.

Claimant requested, but was never offered accommodated employment within her restrictions. If accommodated work were offered now she would take it. She has not worked since her termination. Most of the jobs available to claimant within 30 miles of her home are industrial factories, trailer factories and respondent, all of which have types of air particles at their facilities.

Claimant admits having seasonal allergies before the accident. She testified that before the accident she was very fit and active. She would go horseback riding, help with harvest on her farm, do ranch work (catching horses, putting up hay bales, feeding animals, butchering chickens, etc.) and industrial work. Since the accident claimant has to pace herself while walking so that she does not run out of breath. She can climb no more than one flight of stairs before she must stop and rest.

Claimant is restricted from fumes, animal dander, all types of dust and smoke and must be able to control the temperature and humidity in her environment. She sees Dr. Leeds about every three months to renew prescriptions and for testing. Claimant has had various jobs over the years and in all of those jobs she has been exposed to compromised air quality.

On cross-examination, claimant opined her problems are due to the incident on December 18, 2012, when she was hit in the face with the gypsum. She testified she usually wore a dust mask while she worked, but on the day of the accident she had the mask around her neck and not covering her nose. Claimant testified that even if she would have had the mask covering her nose and face it would not have prevented her from inhaling the gypsum. She testified, "The gypsum came -- hit me in the face with such force, enough force to pack any -- my safety glasses, my ears, everything. It would have just -- it probably would have shoved the dust mask into my mouth along with the gypsum."[1] Claimant indicated nothing this significant ever happened before.

Claimant's current complaints include breathing difficulties and a burning sensation in her left lung. She cannot go anywhere without her inhaler because, if she were to come

[1] Claimant Depo. at 6.

in contact with an irritant, she would be unable to breathe. Even with the rescue inhaler, claimant still has problems being around exhaust, perfumes, dust and any type of irritant. Claimant tries to keep herself away from situations where she will need to use her rescue inhaler, but she still needs it at least once a week and she has other inhalers she uses on a routine basis.

Claimant was told her termination was for leaving her shift early, failing to shut off equipment and for poor job performance, basically everything that happened on February 2, 2013, when Toby, the on-call foreman/manager, told her to shut down and go home. Claimant testified she called Toby four times for four different issues during her shift on February 2, 2013. Claimant testified that Toby told her if there were more problems past 2:00 a.m., not to call him again, just shut down and go home. Claimant testified that protocol requires a manager be called when there is a problem so she continued to call him and tried to explain that she was not able to shut down properly and had been trying. She was trying to avoid damaging equipment. On her way out, claimant let the Densite operator know what was going on and that she had been instructed to go home. When claimant left, the driers were on hold so that the material would not seize up and cause damage and the autoclaves were suspended so that they would not continue to pressurize and blow up. Claimant shut everything else down.

Claimant only missed four days of work because of her injury before her termination. She never received any communication from the union or respondent with regard to the grievance she filed. Had she not called the union president to inquire, she would not have known it was closed. Claimant has not worked since the accident.

The only income claimant had after her termination was eight months of unemployment. Claimant is able to perform basic household chores and lives on an almost 100 acre farm. Claimant is not able to do many outdoor activities without running out of breath. She is on four different medications, three are inhalers. If she has to talk a lot she has to use her Albuterol inhaler more. Claimant testified she wears a mask at home most of the time and carries one with her when she is out in public, but is embarrassed to wear it.

Harry Merrill, claimant's husband, testified claimant has asthma attacks when she talks too much or walks in a field or when stressed. He also indicated claimant has a deep throat cough when she is not getting enough air. She sounds like she has really bad pneumonia. Mr. Merrill testified that, before the accident, claimant used to hunt a lot and go horseback riding. But now, the physical activity and outside allergens make it difficult for claimant to do those things without losing her breathe. He testified that before the accident, claimant also used to help with hay bales and other farm work. However, since claimant can no longer help with some of the more physical farm work, they have had to hire help. Mr. Merrill indicated claimant is still able to do inside household chores.

James Mullins worked for respondent from October 18, 2010, to the end of August 2013, in Blue Rapids, Kansas, and then transferred to Wheatfield, Indiana, where he stayed until June 30, 2014. Mr. Mullins was the Human Resources Manager at the Blue Rapids plant and was responsible for hiring, promoting, evaluating employees, administering contracts, disciplinary actions, and the health and safety with workers compensation and benefits administration.

Mr. Mullins confirmed claimant worked for respondent from October 2011 to about February 5, 2013. He confirmed claimant had a disciplinary layoff attempt in August 2012. He testified claimant was supposed to be terminated, but the action was amended to a disciplinary layoff based upon the facts.[2] This action was due to a number of performance issues and continuing poor quality production in the job claimant was working at the time on the mixer floor. Mr. Mullins testified several attempts were made to counsel her and bring her up to standards, but those attempts were not successful.

Mr. Mullins testified that claimant's statement that there is gypsum dust several inches thick in the Ultra operator position is not accurate. He testified the amount of dust may vary but most of the system is self contained so there is very little opportunity for dust. He also disagreed with the statement that there is so much gypsum in the air surrounding the plant that the ground is covered in it beyond the plant grounds.

Mr. Mullins testified claimant's position was under the production department. When he learned of the events on February 2, 2013, he conducted an investigation and interviewed Toby Oatney, the maintenance supervisor, John Nordquist, the production supervisor and claimant. He ultimately determined claimant felt the equipment had malfunctioned and was not operable and after multiple calls to Mr. Oatney, claimant believed she had received permission to leave. Mr. Mullins questioned whether Mr. Oatney gave claimant permission to leave and, while it was alright for claimant to contact maintenance, the order for claimant to leave needed to come from her direct supervisor. Claimant never contacted Mr. Nordquist, her supervisor. Instead, according to Mr. Mullins, she clocked out and left the plant without using the proper procedure to shut down.[3]

Claimant was counseled for violating the following clauses of the union's collective bargaining agreement: (1) continuing inefficiency after repeated counseling; (3) insubordination or neglect of duty or disorderly conduct; and (5) dishonesty based on misrepresentation of a conversation and instructions. Ultimately, her employment was terminated.

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[2] Grievance #1 August 2012, Mullins Depo. at 11.

[3] Mr. Mullins testified that when claimant was assigned to the production department, she was provided with training by Phil Hansen, a 25 year employee, and John Nordquist signed off that she was properly trained and allowed her to work alone.

Mr. Mullins testified employees are not to leave the plant without permission because there is liability and someone may get hurt if equipment is left unattended and mechanical or electrical issues could occur and cause damage. He indicated it is important for an employee to be present while any of the machinery is running. He testified:

> . . . there -- there are posted shutdown instructions. So if they felt that the machine was not safe to operate, they would follow those shutdown instructions and shut the machine off, but they would still remain until they were relieved or given other instructions by the supervisor.[4]

The union, on claimant's behalf, filed another grievance after this second attempt to terminate her employment.[5] Claimant was represented by a union representative and a union steward. Claimant was not present at any of the meetings regarding her grievance and ultimate termination. Mr. Mullins testified the steps in the process were followed and the union withdrew the grievance in May 2013 and claimant's February 2, 2013, termination became official.

Mr. Mullins indicated Mr. Oatney was never supervisor or on-call supervisor for the production department. If claimant had instructions that Mr. Oatney was the supervisor to contact if there was a problem during a shift, that information did not come up during the grievance process. He also indicated every operator had written instructions on who to call if there were issues. Those documents were not kept, so there is no way to know who claimant was supposed to call if she had issues on that day.[6]

> Q. If the instruction she was given were to contact Toby Oatney, and she was given his home phone number to do so, and she did contact him four times, and he did give her instructions each time, and he never told her, "no, you're calling the wrong person. You need to call John Nordquist or somebody else." Should she have disregarded what he told her to do?
>
> A. Well, I would say if he had actually told her to go home, she probably would have been on firm ground. I wouldn't have terminated her. But the reality is Toby clearly stated to me that he did not give her that instruction. So -- since he didn't give her those instructions, she had no business leaving.
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> Q. I understand what you're saying. That the boss said I didn't say that, she says he did, but you are saying that had the boss told her to go home, shut it down and go home, then she should have done what he told her?

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[4] Mullins Depo. at 33.

[5] Grievance #2 February 2013, Mullins Depo. at 26.

[6] Mullins Depo. at 80.

A. If the boss had given her those instructions, absolutely, she should follow the instructions she was given.

Q. Alright, so what we're left with is, we're left with Toby Oatney saying "I didn't tell he to do that." And she's saying "That's what he told me to do, that's why I did it.

A. There's one -- one thing you're overlooking there though. Even if it had occurred just as you said, and he told her to leave, the instruction sheets for how to shut the equipment down would to have had to have been followed, and she did not. She left the equipment running and just left. So she did not follow posted instructions, even if everything else was true.

Q. That's not what she testified to. She shut down much of the equipment, as much as she could, and then she couldn't shut down anything else because if she would it would have caused the stuff to freeze up sort of like concrete and would have ruined the equipment that was in. Whereas, the -- the other chance is, that the product is ruined, which is generally what happened. So it was a choice of ruining some product or ruining equipment worth hundreds of times what the product was worth, and she was told that that's what she should do is shut it down and to go home. Apparently Mr. Oatney didn't really like getting called at home at two and three and four o'clock in the morning.

. . .

Q. . . . so basically we have a situation where the -- Mr. Oatney admits that he was contacted, where he gave some directions, she was calling him to get directions on how to do this stuff, and she says he ultimately said shut her down and go home, and she said, "I did shut it down the best I could. Then I did go home and punch out like he told me to." And the company is basically took the managements -- a managers story as being the one to be believed as opposed to the employee. Correct?

A. Yes. From the standpoint of who I believe, I believe the supervisor's testimony over hers, yes.[7]

Mr. Mullins testified he did not believe claimant's statement about not being able to turn off the dryers without ruining them because there are multiple methods of handling the dryers. He testified:

A. . . . It was not unusual for a dryer to get plugged or something. They would shut down the equipment and they actually dump the dryer so that the only loss was that particular material. They actually had a coordinated method of handling that. So I don't believe her statement is accurate, but again, I'm an H.R. guy, not a production guy, so I can't swear to that.

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[7] *Id.* at 44-47.

> Q. And so what you're saying is they would dump the material and loose [sic] it, and that's exactly what happened here. The material ended up being lost.
>
> A. Yeah.[8]

The plant operates 24 hours a day, seven days a week, with three shifts and with three operators taking eight hour shifts. When one operator wants time off the other two split the shift, each doing a 12 hour shift. Mr. Mullins testified that customer demand dictates the plant run 24 hours a day with scheduled shutdowns for different types of major maintenance activities.

John Nordquist, a production supervisor for respondent, testified the supervisors work on rotating shifts and are responsible for keeping an eye on the equipment, making sure it runs correctly and safely. Mr. Nordquist testified if there are any problems with the equipment, maintenance is called to correct the problem. He testified if there is a problem with a machine, a production supervisor is to be contacted and the supervisor will determine if maintenance needs to be called. A production employee is not supposed to directly contact maintenance.

Mr. Nordquist described the Ultra department as identical to the Dynsite department except it uses a computerized system to monitor the equipment and requires more technical skill. He indicated that training in the Ultra department takes two weeks, eight hours a day. During training, employees learn how to operate the machines and what to do if something goes wrong. He testified training is usually scheduled when maintenance needs to be performed on the equipment, so that they know both sides of the process. Mr. Nordquist oversees the Ultra department, but is not involved directly with training any of the operators. Mr. Nordquist testified he did not train claimant.

Mr. Nordquist was not at the plant at the time of claimant's accident. When he learned what happened, he conducted an investigation. He found they were changing from number two rock to number one rock in the Ultra department and were at the tail-end, making sure the screens were clean, and claimant found a little bit of material left in the bottom of the bin. As claimant opened the gate on the bin material came gushing out and a huge dust cloud blew in her face. Mr. Nordquist testified it is about four feet from the bin to the screen and the dust comes through a chute, so if the screen is open too much the dust that comes out of the chute floods over, causing dust and material to fall on the floor. He testified claimant had been through this process, which occurs twice a week, several times before, with no problems. The Ultra department was in the process of changing screens on the day of claimant's accident.

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[8] *Id.* at 83.

Mr. Nordquist testified the sacker position produces the most dust, with the mixer position not being too bad unless something breaks down and then the Dynsite and Ultra positions produce less because they start with raw rock that has moisture in it. He indicated that claimant's statement that the amount of dust in the Ultra department is inches thick is not accurate. He indicated there may be some corners that have never been cleaned that might have a lot of dust, but for the most part, the building is really clean. He testified there is, at most, a sixteenth or an eighth of an inch of dust.

He testified that if the wind is blowing hard, dust will get on his car. He testified he never noticed a difference in the ground surrounding the plant. He also indicated he owns some property less than a mile from the plant and does not have issues with dust on that property.

Mr. Nordquist testified the other supervisors at the plant are Mike Lynn and Toby Oatney. Mr. Nordquist testified Mr. Oatney was a maintenance supervisor in February 2013.[9] He testified a maintenance supervisor oversees the mechanic crew and gets equipment repaired. A production supervisor monitors everything to do with the production. When equipment breaks down, maintenance is called in and production is kept informed of the progress. He testified equipment breaks down at least once a week.

Mr. Nordquist testified that if equipment is not properly shut down and is left unattended, pressure could build up and cause an explosion. That is why there is a shutdown sequence that must be followed.

Mr. Nordquist testified that the product that was being manufactured on February 3, 2013, when claimant left, was overcooked and found to be unusable because it had been drying for several hours instead of the typical hour and a half. The amount of product that was unusable was around eight tons, which was around two tons of material over four dryers. This cost respondent 28-32 hours of cook time. He testified that an Ultra operator should have been present when the product overcooked so that it could have been dumped earlier and not as much product would have been lost.

Mr. Nordquist testified that when claimant discovered there was a problem she should have called a production supervisor, who would have contacted Toby Oatney. Therefore, when claimant called Mr. Oatney directly, he should have told her she contacted the wrong person and instructed her to call a production supervisor. Mr. Nordquist would not answer the question whether claimant should have followed the directions of Mr. Oatney, the maintenance supervisor. He would only say that claimant should have contacted a production supervisor and went from there instead. He indicated Mr. Oatney

[9] Mr. Oatney left or was fired from respondent's employment not long after claimant's employment was terminated.

was not claimant's direct supervisor. Therefore, she should have questioned his instructions, and at the same time, she should not have directly contacted him.

Mr. Nordquist testified that there are two production managers and they work two shifts, 7 a.m.-3 p.m. and 3 p.m. -11 p.m. There is no production manager on the graveyard shift, 11 p.m. - 7 a.m., which is what claimant was working, so she would have had to call a production manager at home to get assistance. Mr. Nordquist testified he does not remember what shift he was scheduled to work February 2, 2013, but he knew it wasn't the graveyard shift.

Mr. Nordquist supervises close to 40 people over three buildings, which is a combination of employees from sacking, mixing and Ultra. He does not wear a dust mask while he is at work and most of the employees do not wear dust masks either, but there are a few who do. He indicated there were times when claimant wore a dust mask and the rest of the time she did not.[10]

When asked if claimant was a satisfactory employee he indicated:

> I had issues when she was on the mixer floor. Had some problems there getting the mixes made correct. I don't remember the dynsite when she was over there necessarily. We had some issues when she was in ultra and that process of trying to figure out whether we had an issue with the equipment or whether it was an issue with the employee making a mistake. I don't know that it was ever completely determined. We'd had a couple issues that things didn't work right.[11]

He could not recall if he gave claimant any warning or disciplinary action, but indicated any of that information would be in claimant's file in human resources. He testified there is a four-step disciplinary process that begins with a verbal warning, then a written warning, followed by a suspension and then termination. Because he supervises so many people over a large space, Mr. Nordquist indicated he does not spend a lot of time with the employees and tends to focus on the ones who make the most mistakes.

Mr. Nordquist acknowledged claimant was probably not suited for the position in the Ultra department, especially given her difficulties in her other positions, but because of the bidding process through the union, she was able to get the position.

Claimant met with William Leeds, D.O., on September 3, 2013, for an evaluation. Dr. Leeds specializes in pulmonary, critical care, sleep medicine and smoking cessation.

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[10] Nordquist Depo. at 46-47.

[11] *Id.* at 49-50.

Claimant reported being hit in the right side of her face with a bolus of gypsum[12], which resulted in her nostrils and mouth being coated with gypsum fibrosum. Claimant reported her lungs feeling like they were on fire. Claimant's complaints were cough with dyspnea and wheezing with minimal exertion. She reported a history of intermittent heartburn and chest pressure. Dr. Leeds diagnosed irritant-induced asthma, which is often known as RADS.[13] He found claimant to have ongoing inflammation and to be quite symptomatic. He recommended claimant increase her Symbicort. He also added Tudorza and recommended claimant wear a mask whenever she was outside in her fields.

On September 19, 2013, claimant was reevaluated and continued to have irritant induced asthma with a minimal obstructive lung defect. She responded well to bronchodilators. Claimant was given more medication and continued on others.

On September 26, 2013, claimant continued to have left-sided chest pain, burning and a new symptom of severe halitosis. Dr. Leeds was concerned claimant had esophageal reflux that seemed severe. He focused on clearing up claimant's acute medical issues. Claimant was started on omeprazole and Voltaren gel.

On October 18, 2013, Dr. Leeds diagnosed claimant with irritant induced bronchial hyper responsiveness, probable chest wall pain from cough and dyspnea related to bronchial hyper responsiveness and probably an element of gastroesophageal reflux disease. Dr. Leeds formalized a prescription plan for claimant and asked her to stop the omeprazole and monitor if the halitosis resumed. She was instructed to avoid changes in temperature and humidity, dust, fumes, chemicals and animal dander. He felt claimant's condition was chronic and she would likely have lifelong predispositions to exacerbations which can be managed with routine medication therapy.

On December 2, 2013, Dr. Leeds wrote that since the accident, claimant has had significant problems and has been treated aggressively. Dr. Leeds opined claimant's problems with coughing, dyspnea and wheezing were not present before the December 18, 2012, work accident. Claimant would need preventative treatment the rest of her life. This was not considered an allergic reaction and is moderately severe. Dr. Leeds felt it was almost certain claimant still had gypsum in her lungs and may have for the rest of her life and, as a result, required monitoring at least every other year in the form of a chest x-ray and a pulmonary function test. The x-rays were required because it could be several years before visible signs of actual deposits of gypsum appear in the lungs.

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[12] Dr. Leeds indicated gypsum is a non-toxic substance used in various applications.

[13] Reactive Airway Dysfunction Syndrome. A term for patients who had no other medical problems, no lung problems, but after some acute exposure, have symptoms similar to asthma.

On January 17, 2014, Dr. Leeds found claimant to have a 25 percent impairment of function to the body as a whole. He indicated it was impossible to say if claimant still had gypsum in her lungs, but that she probably had some fibers in her lungs. As of July 28, 2014, claimant was basically housebound to avoid exacerbations.

Dr. Leeds identified claimant as a life-long non-smoker with no history of cardiac or pulmonary abnormalities. He indicated the gypsum hitting claimant in the face and her inhaling it would be the prevailing factor or primary factor in causing her diagnosis, symptoms and problems. He also indicated this would be true in regard to claimant's need for medical treatment, impairment and need for activity and environmental restrictions.[14] He testified claimant's type of reactive airways disease is something that arose out of a particular and peculiar hazard of gypsum exposure at her place of employment, as ordinary people would not be exposed to that concentration of gypsum.[15]

Dr. Leeds reviewed the task list of Bud Langston and opined, within his recommended restrictions, claimant could no longer perform 19 to 21 tasks out of 25 for a task loss of 76 to 84 percent. He recommended claimant stick with office work and consider any other type of employment on a case by case situation relating to the ambient air quality.

Claimant met with Thomas Beller, M.D., for an examination on February 12, 2014, at respondent's request. Dr. Beller is board certified in internal medicine with a subspecialty in pulmonary medicine. Claimant's chief complaint was difficulty breathing with intermittent shortness of breath with exertion. She also complained of constant left-sided chest pain, which was worse with heavy breathing and generalized fatigue. Dr. Beller noted claimant had a history of seasonal allergies that were previously treated with immunotherapy. Claimant was not, at that time, having any problems with her allergies.

At the time of this visit, claimant's respiratory symptoms had improved but had not resolved. Dr. Beller examined claimant and diagnosed shortness of breath, work-related exposure to gypsum dust on December 18, 2012, reactive airways dysfunction syndrome, allergic rhinitis, and gastroesophageal reflux disease. He opined the allergic rhinitis or gastroesophageal reflux disease were not work-related.

Dr. Beller found claimant had respiratory symptoms associated with asthma, specifically reactive airways dysfunction syndrome (RADS) after a single specific exposure. He noted that, although gypsum dust is typically not considered a strong irritant, it may have strong irritant qualities associated with it and claimant's symptoms occurred within a short period of time after her exposure.

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[14] Leeds Depo. at 15-16.

[15] *Id.* at 26.

Dr. Beller could not explain claimant's persistent chest pain, but did not think it was directly related to the exposure. He found claimant to be at maximum medical improvement. He assessed claimant a 10 percent impairment, based on the 4th edition of the AMA *Guides,* for her respiratory disease. Claimant's work-related dust exposure, in his opinion, was the prevailing cause of her respiratory disorder. Dr. Beller agreed with her current treatment. He felt claimant able to work, but she should avoid exposure to fumes, dust, smoke and respiratory irritants as much as possible. He also felt claimant needed to be seen three to four times a year to monitor her symptoms. Dr. Beller reviewed the task list compiled by vocational expert Karen Terrill, and found claimant could no longer perform 18 out of 39 tasks for a 46 percent task loss.

Claimant met with vocational expert Karen Terrill for a vocational assessment via telephone on August 6, 2014. Ms. Terrill determined that, considering the limitations imposed by Dr. Leeds and Dr. Beller, there are jobs claimant could perform. Two of those jobs are in an office setting as a customer service representative earning between $9.65 and $14.23 an hour, and as an office and administrative support worker, earning between $8.26 and $11.65 an hour. Ms. Terrill identified 39 tasks for the determination of task loss.

Claimant met with vocational expert Bud Langston for a vocational assessment. Mr. Langston compiled a task list of 25 for determination of task loss. He determined claimant could work in a clerical position if the co-workers refrained from using perfumes, deodorants and other environmental irritants that exacerbate claimant's condition. He opined claimant would likely need to use a mask in any job setting and would need to limit her exposure to the public. These things could limit claimant's chances to find work. Mr. Langston expected claimant to earn $8.50 to $9.00 an hour. He testified that although it would be tough placing claimant in a job with her limitations, she was not bad enough to be considered permanently and totally disabled.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b(c) states:

> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-510e(a)(2)(C)(E)(i) states:

> (C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
> (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is

> equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and
> (ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.
> In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.
>
> . . .
>
> (i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

The parties agreed *Morales-Chavarin*[16] utilizes the appropriate standard for determining if an employee was discharged for cause. Such case stated what constituted "good cause to terminate" an employee so as to prohibit an award of work disability benefits was a question of first impression.[17] *Morales-Chavarin* held:

> [T]he proper inquiry to make when examining whether good cause existed for a termination in a workers compensation case is whether the termination was reasonable, given all of the circumstances. Included within these circumstances to consider would be whether the claimant made a good faith effort to maintain his or her employment. Whether the employer exercised good faith would also be a consideration. In that regard, the primary focus should be to determine whether the employer's reason for termination is actually a subterfuge to avoid work disability payments.[18]

Thus, *Morales-Chavarin* indicates one of many factors in assessing cause to terminate is the parties' good faith or lack thereof. A possible problem with analyzing the good faith of the employee and employer, or lack thereof, is that *Bergstrom*[19] indicated reading a good faith standard into K.S.A. 44-510e was contrary to the plain meaning of the statute. Such statute instructed that a worker's wage loss was based on actual wages earned post-injury. *Bergstrom* disapproved of an implied requirement that injured workers exercise good faith in attempting to mitigate wages lost to work injury and any

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[16] *Morales-Chavarin v. Nat'l Beef Packing Co.*, No. 95,261, 2006 WL 2265205 (unpublished Kansas Court of Appeals opinion filed Aug. 4, 2006), *rev. denied* 282 Kan. 790 (2006).

[17] *Id.* at 4.

[18] *Id.* at 5.

[19] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

consideration of the employee's wage earning capacity or capability because K.S.A. 44-510e contained no such language. To include good faith in the definition of "for cause" in K.S.A. 2012 Supp. 44-510e(a)(2)(E)(i) might result in the Board appending language into the statute that is not based on a plain reading of the statute. However, *Bergstrom* only addresses interpreting a plain and unambiguous statute. *Bergstrom* states:

> The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007). The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language. *Hall*, 286 Kan. at 785.
>
> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).[20]

The term "for cause" is not defined in the Kansas Workers Compensation Act (the Act). What constitutes a termination "for cause" is subject to interpretation. The United States Supreme Court noted the term "cause" is a broad and general standard and that a more specific definition would be impracticable given the "infinite variety of factual situations [that] might reasonably justify dismissal for cause . . . ."[21] Thus, it would appear the term "for cause" in our Act is not plain or unambiguous, but is broad, general and, according to the highest Court in the land, not practically subject to a precise definition.

Morales-Chavarin discussed numerous Kansas cases and arrived at a standard of reasonableness based on all the circumstances, including the good faith of the parties. Of note, *Morales-Chavarin* did not adopt a definition of "for cause" that was referenced in *Decatur*.[22] In such case, the Kansas Supreme Court did not specify or adopt a definition of "for cause." Rather, it simply recited the 10th Circuit's definition of the word "cause" in *Weir*,[23] which states:

> [Cause for discharge] is a shortcoming in performance which is detrimental to the discipline or efficiency of the employer. Incompetency or inefficiency or some other

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[20] *Id.* at 607-08.

[21] *Arnett v. Kennedy*, 416 U.S. 134, 160–61, 94 S. Ct 1633, 40 L.Ed.2d 15 (1974), *overruled on other grounds by Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

[22] *Decatur County Feed Yard, Inc. v. Fahey*, 266 Kan. 999, 974 P.2d 569 (1999).

[23] *Weir v. Anaconda Co.*, 773 F.2d 1073 (10th Cir.1985).

> cause within the control of the employee which prohibits him from properly completing his task is also included within the definition. A discharge for cause is one which is not arbitrary or capricious, nor is it unjustified or discriminatory.[24]

The Board affirms the result of the judge's decision. However, we would rely on *Morales-Chavarin,* which focuses on all of the factual circumstances, reasonableness, and the good faith of all parties, including whether there are attempts to manipulate the monetary result of a claim. While *Morales-Chavarin* predates the 2011 amendments to the Act, it is the best litmus test we have for what the Kansas Court of Appeals called a matter of first impression.

We disagree with the judge's statement that the employment security law definition of being discharged for misconduct can or should be used to determine termination for cause in workers compensation cases. The term "for cause," for workers compensation purposes, need not necessarily rise to the level of misconduct used in unemployment cases. The Legislature could have indicated "for cause" is synonymous with being discharged for misconduct, but did not do so.

The *Weir* definition of "cause" designed by the 10th Circuit, focused on employee inefficiency, incompetency or other shortcoming and what is detrimental to the employer. We reiterate that the 10th Circuit's definition of "cause" was not adopted by the Kansas Supreme Court. Indeed, *Morales-Chavarin* merely states the Kansas Supreme Court "referred to" or mentioned the *Weir* definition.[25] The standard should be based on the factors noted in *Morales-Chavarin*.

We disagree with the Board minority that the judge's award nearly requires claimant to have acted in bad faith before being terminated for cause. The judge certainly discussed good and bad faith and cases predating the 2011 amendments to the Act, but the judge did not conclude claimant could not be fired for cause absent her acting in bad faith. Rather, the judge's conclusion claimant was not terminated for cause was based on her findings that claimant followed the instructions of the supervisor she believed to be in charge.

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[24] *Id.* at 1080. *Decatur*, while not clearly defining "cause," also touched on "reasonableness" and "good faith and fair dealing." *Decatur*, 266 Kan. at 1008 and 1010. *Gorham v. City of Kansas City*, 225 Kan. 369, 373-74, 590 P.2d 1051 (1979), which involved removing police officers from employment for "just cause," equated the term "cause" as being "legal cause, or just cause, a substantial, reasonable or just cause, related to matters of a substantial nature pertaining to duties or obligations imposed." See also *Will v. City of Herington*, 201 Kan. 627, 633, 443 P. 2d 667 (1968) (stating "for cause" concerns "for good cause"). The Board previously rejected the *Weir* definition of "cause" noted in *Decatur*. *Brooks v. Baker's Apple Market*, No. 1,013,563, 2007 WL 4296011 (Kan. WCAB Nov. 28, 2007).

[25] *Morales-Chavarin*, 2006 WL 2265205 at 5.

Respondent carries the burden to prove it discharged claimant for cause.[26] Respondent did not meet that burden. The reasons set forth by respondent to justify claimant's termination are suspect. Moreover, the judge had the firsthand opportunity to assess claimant's testimony and found her to be credible and acting in good faith.

The primary cause for claimant's termination concerned claimant having problems with machinery during her shift beginning February 2 and ending February 3, 2013. However, prior to that time, a supervisor, Michael J. Lyhane, sent a January 30, 2013, email to Donnie Stein, the production manager. The email stated claimant started hyperventilating and needed to use her inhaler after failing to get equipment to run properly. Obviously, claimant's breathing problems were the result of her workers compensation accident. The email further stated, in part:

> #1 – I believe this is another example of DeAnna not being able to trouble shoot her machinery. I believe this is the third consecutive time that she has been unable to make the change to from white to dirt or vice versa on her own. Thus furthering the question of whether she should be qualified to operate the Ultra department.
>
> #2 – Her sudden onset of breathing issues when there is a disruption of any sort to the normal process leads me to believe that her presence is a safety issue. If there were to be an issue while an autoclave is open or basket raised and her condition gets agitated we could be looking at disastrous results. I do not believe that for her own safety and the safety of others on the property that could be affected, that she should be allowed to work in any form of solitary condition without anyone that can make sure she does not have an attack that her inhaler doesn't get under control.[27]

Therefore, just four days prior to the incident that gave rise to claimant's discharge, an internal email focused on claimant's breathing being a safety issue. This fact gives some credence to claimant's argument that she was terminated due to her job-induced asthma and not for cause.

Claimant testified that during her shift starting February 2, 2013, she experienced a problem with the equipment she was operating. Claimant had worked in the Ultra department for six months. She called Toby Oatney, the manager on duty, four times and reported the problems. Claimant testified as to her belief that Mr. Oatney was the supervisor on duty. While Mr. Oatney was a maintenance supervisor, no production supervisor was on duty. Claimant could have telephoned the on call production supervisor, but it made sense for her to alert a maintenance supervisor about an equipment malfunction and her difficulty shutting down equipment. According to claimant, Mr. Oatney

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[26] *Gutierrez v. Dold Foods, Inc.,* 40 Kan. App. 2d 1135, 199 P.3d 798 (2009).

[27] Stipulation (filed Nov. 13, 2014) at 8.

told her to shut down the machine and go home. Claimant indicated she shut the machine down in a manner as to not damage the equipment and went home.

Respondent indicated it discharged claimant for three reasons:

- continued inefficiency after repeated counseling;
- insubordination and neglect of duty – leaving the plant without permission and failing to shut down the equipment; and
- dishonesty.

Of note, Mr. Mullins agreed that if claimant's version of events were correct, he would not have terminated her employment, but he opted to believe Mr. Oatney's statement that he did not tell claimant to go home.[28]

It cannot be stressed enough that the judge believed claimant's description of events, which was largely uncontroverted. Mr. Oatney did not testify. Written statements attributed to Mr. Oatney, including a write-up and an email, were made part of the record. Such documents do not indicate if he did or did not give claimant permission to go home on February 3, 2013. Mr. Nordquist testified Mr. Oatney should have told claimant to call a production supervisor instead of him.[29] There is no evidence from these documents generated by Mr. Oatney that he told claimant she should not be calling him and instead should have called her production supervisor.[30] From Mr. Oatney's brief statements, these Board Members cannot conclude claimant was dishonest. It is difficult to place much credence in statements Mr. Mullins attributes to Mr. Oatney to the effect that Mr. Oatney never told claimant to go home. No witness even knows the whereabouts of Mr. Oatney.

While the Board conducts de novo review, the Board nonetheless often opts to give some deference – although not statutorily mandated – to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person.[31] The judge had the first-hand opportunity to assess claimant's testimony. The judge adopted as fact claimant's testimony that she was following supervisor Oatney's

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[28] Mullins Depo. at 44-45, 60, 88.

[29] Nordquist Depo. at 22, 32, 37.

[30] Stipulation (filed Nov. 13, 2014) at 5-6.

[31] *Foy v. Kansas Coachworks, LTD*, No. 1,051,265, 2014 WL 1758032 (Kan. WCAB Apr. 21, 2014). It is "better practice" for the Board to provide reasons for disagreeing with a judge's credibility determinations. *Rausch v. Sears Roebuck & Co.*, 46 Kan. App. 2d 338, 342, 263 P.3d 194 (2011), *rev. denied* 293 Kan. 1107 (2012). See also *Lake v. Jessee Trucking*, 49 Kan. App. 2d 820, 836, 316 P.3d 796 (2013), *rev. denied* 301 Kan. ___ (2015).

instructions to shut down the equipment as best she could and go home. The judge also believed claimant's testimony that she left some equipment running to avoid severe damage to the machinery. In other words, the judge made a credibility ruling in claimant's favor. The judge did not adopt respondent's asserted version what transpired as true. The dissent does not explain why it would diverge from the judge's credibility determination.

Other evidence of what claimant did prior to her work accident does not sufficiently justify claimant's termination. In August 2012, prior to her accident, claimant was terminated based on inefficiency. After a union grievance, her termination was rescinded. Mr. Mullins reinstated claimant's employment after he determined she may not have had the appropriate training. It seems unfair to use claimant's prior termination to justify her subsequent termination when it turned out respondent agreed such prior termination was unwarranted.

Mr. Mullins indicated claimant did not have a good record for tardiness and attendance and she went on an authorized one-week leave to Alaska and stayed a week longer without contacting respondent. Claimant's attendance was not the reason for her termination. While Mr. Mullins indicated he should have terminated claimant based on her use of leave time while in Alaska, Mr. Mullins granted claimant the additional time off.[32]

Respondent asserts claimant had been previously written up numerous times for inadequately performing her job as a mixer. Mr. Mullins counseled claimant twice about her job performance when she worked in the mixing department. He did not counsel her after she was reinstated and given the job in the Ultra department.[33] Mr. Nordquist testified he had issues with claimant when she did the mixer job, but nothing else until the event leading to claimant's termination.[34] Mr. Nordquist did not know if he ever gave claimant any sort of warning or disciplinary action, but if he had, respondent should have had a copy of any verbal or written reprimand.[35] No such documentation was in the evidentiary record. From late June 2012 until she was discharged, claimant received no write-ups. From August 2012 until her February 5, 2013, termination, claimant was not cited for inefficiency, insubordination, neglect of duty or dishonesty. Claimant testified that prior to February 5, 2013, when she was discharged, she had not received any criticism of her job performance in the Ultra department.

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[32] Mullins Depo. at 53, 62.

[33] *Id.* at 55, 57.

[34] Nordquist Depo. at 49.

[35] *Id.* at 50. Respondent makes written documentation of a verbal warning.

As an aside, claimant argues the timing of her termination suggests she was terminated because of her workers compensation claim.[36] The incident giving rise to claimant's termination occurred on February 2 and 3, 2013 and she was discharged on February 5.[37] Claimant's Application for Hearing was mailed with a January 31 letter and received by the Division of Workers Compensation on February 4. Such letter does not appear to have been copied to respondent. Division records show it emailed respondent notice that claimant filed a claim. Such email was dated February 6, 2013. There is insufficient evidence claimant was terminated after respondent knew she actually filed a formal claim.

In any event, when considering the broad standard set forth in *Morales-Chavarin*, claimant was not terminated for cause. The reason for her wage loss is her injury and disability. Both testifying physicians indicated claimant should be medically restricted from working in respondent's dusty work environment. The Board affirms the judge's grant of a work disability award.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated December 15, 2014, is affirmed.

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[36] In *Morales-Chavarin*, the Court noted the timing of an employee's termination supported a finding his employer did not act in good faith.

[37] The Award indicated claimant was discharged on February 3, 2013. This is incorrect. Claimant's written statement dated February 8, 2013, indicates she worked on February 4 and was discharged on February 5, 2013. (See Mullins Depo. at 8, 20, 41; Stipulation (filed Nov. 13, 2014) at 2).

IT IS SO ORDERED.

Dated this _____ day of May, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENT

In order to be eligible for a work disability claimant's wage loss must be at least 10 percent, which is directly attributable to the work injury and not to other causes or factors. As noted above, wage loss caused by voluntary resignation or termination for cause shall not be construed to be caused by the injury. Here, claimant was terminated after leaving equipment running and leaving her job prematurely. Claimant contends she was simply following the instructions of Toby Oatney, the on-call manager. However, respondent contends Mr. Oatney was a maintenance supervisor, and not a production supervisor. Additionally, respondent contends Mr. Oatney did not instruct claimant to leave her job while the machinery was still running, without having properly shut it down. Claimant contends the machinery would not shut down and she left it in a condition that would ensure no harm would come to the machine.

The dispute centers around whether claimant's termination for cause justifies a denial of benefits to claimant above the functional impairment awarded by the ALJ. The analysis of the ALJ centers around whether claimant exercised good faith in maintaining her job with respondent. The award seems to go so far as to require that a claimant act in bad faith in order to justify the denial of work disability benefits due to a termination for cause. However, the statute contains no such good faith/bad faith requirement. It merely states the termination must be for cause.

The Kansas Court of Appeals in examining the legislative intent underlying K.S.A. 1988 Supp. 44-510e(a), determined that the statute implicitly contained a requirement that

injured workers exercise "*good faith"* in attempting to mitigate their wage loss.[38] This good faith requirement remained until the Kansas Supreme Court ruled the statute contained nothing requiring an injured worker to make a good-faith effort to seek out and accept alternate employment.[39] The Court ruled that the prior line of cases creating the good-faith requirement violated the principle that an appellate court must give effect only to express statutory language, rather than speculating what the law should or should not be. Language should not be added to a statute which is not readily found in the statute.

Here, the ALJ has implied that respondent has the burden of showing claimant acted in bad faith leading to her termination. Even after acknowledging that leaving unattended machinery still operating presented an inherently dangerous situation, the ALJ awarded claimant work disability benefits after noting claimant believed she was acting in good faith and thus, the termination was "not for cause."[40]

K.S.A. 2012 Supp. 44-510e(a)(2)(E)(i) contains no requirement that respondent prove claimant acted in bad faith or was acting in good faith while performing the act which ultimately led to her termination. The statute merely requires the termination be "for cause."

The Kansas Supreme Court, in *Decatur*[41], in discussing the terms "cause" and "good cause" within an employment contract, referred to *Weir*[42], which stated:

> "[Cause for discharge] is a shortcoming in performance which is detrimental to the discipline or efficiency of the employer. Incompetency or inefficiency or some other cause within the control of the employee which prohibits him from properly completing his task is also included within the definition. A discharge for cause is one which is not arbitrary or capricious, nor is it unjustified or discriminatory." 773 F.2d at 1080[43]

Here, as noted by the ALJ, claimant left unattended a still running piece of machinery, which the ALJ described as an "inherently dangerous situation". This was not claimant's first disciplinary situation involving improper performance. We would find this

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[38] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[39] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[40] ALJ Award (Dec. 15, 2014) at 11.

[41] *Decatur County Feed Yard, Inc., v. Fahey*, 266 Kan. 999, 974 P.2d 569 (1999),

[42] *Weir v. Anaconda Co.*, 773 F.2d 1073, 1080 (10th Cir. 1985).

[43] *Decatur*, 266 Kan. at 1007.

claimant was terminated for cause and any wage loss associated with this termination should not be used to justify a wage loss under K.S.A. 2012 Supp. 44-510e(a)(2)(E)(i). The award of the ALJ allowing a work disability should be reversed and, claimant's award in this matter limited to her 10 percent whole body functional impairment.

_____
BOARD MEMBER

_____
BOARD MEMBER

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